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REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

Replies by States and regional groupings on steps taken to meet their commitment to the Set of Principles and Rules

Note by the UNCTAD secretariat

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I. INTRODUCTION

1. The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, in section G, provides that "States which have accepted the Set of Principles and Rules should take appropriate steps at the national or regional levels to meet their commitment to the Set of Principles and Rules". Further, in section F, the Set provides for "communication annually to the Secretary-General of UNCTAD of appropriate information on steps taken by States and regional groupings to meet their commitment to the Set of Principle and Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices".

2. As in previous years, the Secretary-General of UNCTAD, in a note dated 7 May 1993 (TD/420/8(6)), requested States and regional groupings to provide the above-mentioned information not later than 15 June 1993. In the note, the Secretary-General reiterated the secretariat's statement made during previous sessions of the Group that this information should concentrate on developments directly relevant to the implementation and application of the Set by member States, for example: (i) the introduction of new RBP legislation; (ii) the revision and/or amendment of existing RBP legislation to bring it into line with the Set; (iii) the translation and dissemination of the Set and the organizing of contacts with business circles to ensure its effective application; (iv) the exchange of information with foreign RBP control authorities to strengthen RBP controls; (v) notifications of, and action taken against, RBPs which adversely affect foreign countries and which originate in enterprises under the notifying country's jurisdiction; (vi) consultations between countries on matters related to the control of RBPs, with a view to reaching understandings; (vii) the organization of, participation in, or provision of financial and other resources for technical assistance and advisory and training programmes on restrictive business practices, particularly for developing countries.

3. The information received is therefore reproduced and submitted to the twelfth session of the Intergovernmental Group of Experts on Restrictive Business Practices for its annual review of the operation of and experience arising from the application and implementation of the Set. The present note contains replies received, as of 9 July 1993, from the following States: Germany, Norway, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The terminology used in the submissions is that of the submitting Government.

II. REPLIES FROM STATES

GERMANY

The Government of Germany has communicated the following:

New restrictive business practices legislation

4. Neither the German Act against Restraints of Competition (ARC) nor the Unfair Competition Act (UCA) was amended in the period under review. At

present, there are no revision plans. A French translation of the ARC as amended in 1990 will soon be completed, and a copy of the translation will be sent to the UNCTAD secretariat.

Control of restrictive business practices

5. The most convincing way of expressing the commitment to the Set of Principles and Rules is a vigorous enforcement of the national competition laws by challenging cartels, abuses of market power, mergers and other anti-competitive practices. Such measures will, at the same time, promote economic efficiency, help to make enterprises fit for competition in domestic and foreign markets, and finally enhance consumer welfare.

6. The ban on cartels, a central rule of German competition law, secures the freedom of action of independent market participants in competition and protects the market against restrictive contracts and agreements. Although economic and technological change and the creation of larger economic areas have intensified international competition in many markets and rendered cartelization more difficult, there are also numerous markets which have largely retained their national character. This applies to those sectors which due to economic, technological or institutional conditions are not or not fully exposed to competition from foreign suppliers (e.g. retail trade, construction industry, many building materials markets as well as energy). On the other hand, the sharpening of international competition resulting from economic and technological change causes companies to seek to avoid the competitive pressure by means of cooperative cross-border market strategies. The protection of competition from restrictive horizontal agreements therefore remains a major task of German competition law.

7. In the period under review, the Federal Cartel Office (FCO) instituted several important proceedings for illegal horizontal agreements which are, however, still at the investigation or hearing stage. The proceeding against flat glass wholesalers mentioned in paragraph 17 of last year's report has been closed. The FCO imposed administrative fines totalling approximately DM 3.3 million on 16 flat glass wholesalers and insulation glass producers in northern Germany as well as on their responsible managers for entering into restrictive price and rebate agreements. From 1986 and continuing through 1990, the firms concerned agreed on prices, rebates and other conditions and coordinated their market behaviour accordingly. Besides a number of small- and medium-sized firms, subsidiaries of the two leading flat glass producers in the Federal Republic of Germany - namely of VEGLA, Aachen (St. Gobain group of France) and of Flachglas AG, Gelsenkirchen (Pilkington group of the United Kingdom) - took part in the agreements. The decisions have become unappealable. Such hard-core violations affecting the German market will be punished severely by the FCO also in future, no matter whether the violators are German or foreign companies.

8. Gratifyingly, the supervision over market-dominating enterprises for abuses still plays a minor role within the framework of German competition law enforcement. The relatively small number of proceedings in this area concerned regional markets where suppliers are protected from national or international competition, or they related to sectors where the dynamism of

the market is wholly or partly eliminated or impaired by specific governmental regulations, for example, the pharmaceutical, banking and insurance as well as energy supply industries.

9. In a free-market system like that of Germany the supervision of price abuses, i.e. interference in entrepreneurs' freedom to set prices, must be confined to exceptional cases. Moreover, the conceptual problems of such supervision, the fact that often hypothetical reference values have to be relied on, and the high evidentiary requirements made by the German courts in market domination and abuse cases have all contributed to the FCO's poor record in this area.

10. In spite of the fundamental problems involved and the practical difficulties in supervising price abuses, the FCO will continue to conduct proceedings in cases of suspected exploitation abuses. In the period under review the Office, for example, instituted proceedings against leading Berlin area-based credit institutions suspected of abusing their market-dominating positions by paying extremely low interest rates on certain savings deposits. The abuse proceedings have since been closed without any decision having been made, because the general decline of interest rates in Germany has meanwhile resulted in considerable interest rate cuts for other types of deposits in the greater Berlin area, too, whereas interest rates on the savings deposits concerned have remained unchanged.

11. Open markets can make a very significant contribution to the safeguarding of competition in the home market. The FCO therefore issued an abuse decision against three leading German pharmaceuticals wholesalers for hindering a German importer of drugs. The importer concerned was the most important German supplier of reimported German proprietary drugs, who took advantage of the price differential between individual EC countries and offered reimported drugs in the German market at prices about 10 to 15 per cent lower than those charged by domestic manufacturers. As a result of the uniform obstructive attitude of the three leading German pharmaceuticals wholesalers and their continued refusal to include the reimported products of that supplier in their product range, the latter was practically denied access to public pharmacies in Germany. At the same time the drug wholesalers' anti-competitive practices sealed off the German drug market from lower-priced reimports. The decision has not yet become unappealable.

12. In spite of the fact that EC-wide mergers have been subject as a rule to the European Merger Regulation since 1990, national control of mergers by the FCO, which is aimed at safeguarding competitive market structures, continues to be of utmost importance. This is borne out by the number of mergers examined by the FCO, which in the period under review totalled 1,743.

13. In the period under review, the FCO prohibited three mergers (as against one in 1991 and seven in 1990). A number of other mergers posing competition concerns were either abandoned by the firms involved after the FCO had threatened prohibition, or restructured so as to remove the competition concerns.

14. The prohibition of the international merger between Gillette and Wilkinson, in particular, seems to be worth mentioning. The FCO prohibited

the British Gillette UK, of Isleworth, which belongs to the United States Gillette Company, of Boston, from acquiring a stake in the Dutch Eemland Holding N.V., of Amsterdam. Eemland is the sole shareholder of Wilkinson Sword Europe. Gillette and Wilkinson are by far the largest global manufacturers of wet-shaving products. In Germany (and in most West European countries as well), Gillette and Wilkinson account for a market share of approximately 90 per cent. As a result of the Gillette/Eemland merger and the resultant indirect influence on Wilkinson, the companies jointly would have obtained an almost monopolistic market position.

15. In the spring of 1990, Gillette acquired 100 per cent of the worldwide business of Wilkinson Sword - with the exception of the EC- and United States-based business activities. Because of the current merger control provisions, in the EC and the United States Gillette had to content itself with a 22.9 per cent non-voting capital share acquisition in Eemland and, through additional agreements, it secured a competitively significant influence on Eemland and hence indirectly on Wilkinson, too. The ancillary agreements include pre-emption rights, allocation of sales territories and exclusive dealing agreements, control of production and sales quantities as well as the financial resources and the debt structures at Wilkinson. The FCO has challenged this share acquisition under a new provision introduced by the fifth revision of the German Act against Restraints of Competition of 1990 under which share acquisitions even below the 25 per cent threshold may be prohibited if the acquiring company is able to exert a competitively significant influence on the target company. The merger has been challenged by other national competition authorities as well, in particular by the EC, France, Great Britain and the United States.

16. The above case shows that a national authority should, and is able to, challenge restraints of competition, even if they result from acts done outside its territory.

Other activities

17. In the period under review, Germany again met the international commitments mentioned, for example, in section F 6 of the Set, and it will do so in future.

18. In cooperation with the UNCTAD secretariat, the German Government continued its series of competition law seminars for senior officers of national competition authorities with a seminar for Argentina. Early in 1993, another seminar was held in New Delhi for members of the Indian Trade Practices Commission.

19. As further measures in the area of German technical assistance, in particular for developing countries, the Federal Ministry of Economics and the FCO hosted delegations from Cuba, China, Thailand and Zimbabwe, which sought information and advice on competition matters. FCO staff members also gave advice locally in Benin and Mexico, among other countries.

20. The FCO also continued its exchange programme for officials as well as its training programmes for senior officers from other national competition authorities in the period under review.

21. Furthermore, the FCO held its sixth International Cartel Conference, with competition experts from 28 nations participating, among them representatives from the Republic of Korea and the Philippines. The theme of the conference was "Strategic alliances - a new challenge to competition policy".

22. In the period under review, the FCO also started to inform OECD non-member countries on pending FCO proceedings affecting the interests of the nations concerned. However, such voluntary information on specific cases will probably be limited to a few countries, for as a rule it will at most be possible for the FCO to judge whether a pending proceeding has effects on some of Germany's immediate East European neighbours.

23. In order to encourage the dissemination of information on restrictive business practices adversely affecting international trade, the FCO will continue to send English language copies of the FCO's press releases to the UNCTAD secretariat voluntarily.

24. All these measures reflect Germany's growing efforts to honour the important international commitments contained in sections F.2 and G.6 of the Set.

25. For further information, the FCO's activity report covering the years 1991 and 1992 (available only in German), due to be published at the end of June 1993, as well as the English summary of the latest Biennial Report of the German Monopolies Commission, will be sent to the UNCTAD secretariat in due course.

NORWAY

The Government of Norway has stated the following:

The introduction of new RBP legislation

26. On 9 June 1993 a new Competition Act was passed by the Norwegian Parliament. The Act will probably enter into force 1 January 1994. The Price Directorate and the Price Inspectorate will then be transformed into a Competition Authority called Konkurransetilsynet. The Competition Act has as its main target efficient use of society's resources by providing the necessary conditions for effective competition and stipulates that the Competition Authorities shall further and stimulate competition between enterprises.

27. The present system of prohibiting collusion between enterprises with regard to prices, discounts and profit margins has mainly been retained in the Act. So has the prohibition against resale price maintenance. The new Act introduces prohibitions against agreements on sharing of markets and customers as well as prohibition on quotas and quantum limits. The provision allowing the Price Directorate to act against mergers has been maintained and the new Competition Authority will still have the power to act against any restrictive business practice that is considered to be harmful to competition. This may in particular apply to dominant firms that endeavour to strengthen their market dominance.

28. The present Price Act laid particular emphasis on the obligation for restrictive practices and dominant enterprises to report to the Price Directorate and on price regulation. These provisions are no longer a part of the Act. A separate Act relating to specific measures such as price freezes and maximum prices has been passed. The prohibition against unreasonable prices has been retained.

29. As a member of EFTA the competition rules in the EEA Agreement will apply to Norwegian enterprises as soon as the EEA Agreement enters into force.

30. A translation of the new Competition Act shall be forwarded in due course. The English name of the new authority has not been decided.

Advisory and training programmes

31. From 18 March to 26 March 1993 a total of three seminars were organized by UNCTAD. The seminars which lasted for two days took place in Guatemala, Panama and Barbados. These seminars were partly financed by Norway, and the Price Directorate sent one lecturer. This was the fifth time Norway sent lecturers and contributed to the financing of advisory and training programmes for developing countries.

32. In September 1992 the General Director of the Price Directorate took active part as an expert in a seminar held by UNCTAD in China.

The activities of the price authorities based on the Price Act of 26 June 1953

33. The Act instructs the Price Authorities to monitor restrictive practices and dominant enterprises. The Price Authorities may intervene by annulling or calling for amendment any restrictive business practice that may have a harmful effect on production or trade or is considered to be unreasonable or detrimental to the public interest.

34. Two specific forms of regulation are prohibited. Associations or groups of suppliers are, according to provisions of 1957, not allowed either to recommend or stipulate resale prices. Individual firms may, however, issue recommended prices. Any kind of cooperation between enterprises regarding prices, discounts and mark-ups as well as cooperation with regard to tenders are prohibited according to provisions of 1960.

35. In 1988 a new section in the Price Act covering mergers came into force. The Price Council was given the authority to stop a merger on the recommendation of the Price Directorate when the merger would lead to or reinforce a major restraint on competition.

36. All restrictive agreements and associations are obliged to report to the Price Directorate. A report should also be made by enterprises having a market share of 25 per cent or more for a product or a service. The reports are entered into a public register.

Enforcement of competition law and policies 1 May 1992 - 1 May 1993

37. Keeping the market under surveillance in order to ensure that enterprises keep within the limits laid down regarding restrictive agreements is an important part of the activities of the Price Directorate and the Price Inspectorate. In some cases the Price Directorate has proved serious infringement of the prohibition on price agreements and the guilty parties have been heavily fined. In 1992/93 illegal agreements have been proved in the building materials industry and in the battery trade and between suppliers of security systems.

38. In a number of cases the Price Directorate has intervened against trade terms issued by trade associations or dominant enterprises.

39. Discount and bonus systems have been found to have harmful effects on competition by locking customers in or making entry to the market unnecessarily difficult. The Price Directorate has for instance acted against a special discount scheme introduced by a major soft drink producer. The scheme would reward retailers who concentrated their purchases, thus making it difficult for other producers to market their brands.

40. In the field of liberal professions, associations have been obliged to make changes in their by-laws and ethical rules. The rules governing the conduct of psychologists and physiotherapists were found to be unduly restrictive both with regard to competition parameters, reducing entry to the market and to some extent even infringing the prohibition against price cooperation.

41. The Price Directorate may grant exemption from the prohibitions against price agreements and resale price maintenance if this will increase efficiency and reduce prices to such an extent as to outweigh the harmful effects of reduced competition in the particular market.

42. In general the Price Directorate is reluctant to accept any cooperation on prices, mark up or discounts entered into by a large section of a trade or business in any particular market. The cooperation will then almost always have significant detrimental effects on competition whether the cooperation is of a national character or not.

43. Cooperation within chains of enterprises may, however, be beneficial. Such collaboration may well lead to rationalizations and cost reductions for the participating firms, for instance by transferring certain functions for each firm to a central organization. Permitting firms to cooperate may in some cases even result in greater competition in a market by placing the participants in a better position to compete with vertically integrated enterprises or with competing chains of enterprises.

44. Ever since the prohibitions against restrictive agreements were introduced the agreements covering book trade has been exempted. In renewing the exemption in 1992, the Price Directorate excluded textbooks for schools from the exemption and asked for the agreement to be amended so as to allow schools to purchase such books directly from the publishers. The decision has been appealed to the Ministry of Government Administration.

45. At present the Price Directorate only regulates the prices for some very few commodities and services for which market competition is nearly non-existent and for a few agricultural products. The Price Directorate also monitors prices for some commodities for which the market mechanism does not function properly.

SWEDEN

The Government of Sweden stated that:

46. On 14 January 1993 a new competition legislation was promulgated in Sweden, the Swedish Competition Act (see enclosure 1). The Act is based on the principle of prohibition, and will enter into force on 1 July 1993. A new competition body was also created a year earlier on 1 July 1992 - the Swedish Competition Authority - and the former competition authorities, the Swedish Price and Competition Board as well as the Office of the Competition Ombudsman, were consequently closed down.

47. With reference to the 1986 OECD recommendation concerning cooperation between member countries on restrictive business practices affecting international trade, Sweden has initiated and received several notifications in this matter. Exchanges of information with OECD-countries have also taken place. In 1992, the Swedish Competition Authority hosted the annual meeting of the Nordic competition authorities, where the issue of determining a relevant market within the EEC competition rules was discussed.

Summary of technical cooperation activities

1. <u>Bilateral activities</u>:

48. In the spring of 1992 Sweden received a study delegation from the ministries of economics and the competition authorities of Estonia and Lithuania. In connection to this visit two of their representatives were invited for a six week traineeship. In addition to general information of competition rules and organization of the competition authorities in Sweden, the trainees also had the opportunity to study the daily work in different departments, where they were introduced to their special activities.

49. During spring 1993 the Swedish Competition Authority received study visits from Slovenia and Poland. On both occasions the information and the discussions focused on competition legislation and enforcement of competition policy as well as on public regulations and deregulatory measures related to the introduction of market economy. Sweden has also given information about competition policy and public procurement at seminars with Russian ministers in Moscow.

2. <u>Multilateral activities</u>:

50. One expert from Sweden participated as lecturer in UNCTAD's regional seminars in Guatemala, Panama and Barbados for Central American States and Caribbean States in March 1993. Experts from Norway and Canada also took part in the seminars. The seminars dealt with competition policy on a general basis, e.g. with basic features of restrictive business practices, competition

policy and economic reforms and the motives and need for restrictive business practices control legislation. They also dealt with experiences from developed and developing countries in the area of competition policy, including enforcement of legislation.

51. In June 1993 an expert from the Swedish Competition Authority, together with experts from Finland and from the EFTA secretariat, took part in a project of technical assistance to Bulgaria and Romania organized by the EFTA countries. The assistance included seminars and workshops on competition policy, its organization and enforcement in practice as well as on the national legislations in the competition field in the respective countries. Regulatory measures for countries in transition were also topics put forward by the recipients. The project also includes study visits during approximately one week to Sweden and Finland in order to follow up and to provide more detailed information. The visits of delegations from Bulgaria and Romania are envisaged to take place during the autumn 1993.

SWITZERLAND

52. The Government of Switzerland stated that:

I. (i) The Swiss legislation concerning cartels was not amended in 1992. The law which came into effect on 1 July 1986 is still applicable.

(ii) A study commission has been entrusted by the Minister of the Economy with responsibility for preparing a bill providing for the strengthening of the rules applicable to cartels and similar organizations and for the supervision of mergers. This commission is due to submit a preliminary draft bill, together with a commentary, in the course of 1993. A procedure for consultations with the principal Swiss political bodies as well as the economic circles concerned will then be set in motion.

(iii) The annual report on the work of the Cartels Commission always makes reference to the work of UNCTAD (see, for example, annex, p. 74).

II. (i) As indicated above (I (ii)) the law governing cartels is now being revised. This law is applied either by the Cartels Commission (A), or by the judge of the civil court (B). As a rule, the Cartels Commission deals with cases of public interest, whereas private cases fall within the competence of the judge of the civil court.

A. The work of the Cartels Commission is described in detail in its annual report. This report contains a summary of the main cases dealt with and is published simultaneously in French and German.

B. No court decision was published during the current year.

(ii) The annual report of the Cartels Commission for 1992 is attached as an annex (publ.CCSPr 1a/1993).

(iii) The Swiss authorities have not published any relevant studies, guidelines or reports on matters relating to restrictive business practices.

As regards the specific question of mergers and take-overs, the law concerning cartels permits the Commission to concern itself with such cases. Nevertheless, the legal basis and the means of action are limited, which is why the Commission does not attend to such cases systematically. A description of the cases examined is given on pages 47 and 69 ff. of the annual report (annex).

The specific investigations are described in the annual report of the Cartels Commission, pages 44 ff (annex).

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

The Government of the United Kingdom submitted the following information:

CHANGES TO COMPETITION LAWS AND POLICIES ADOPTED OR ENVISAGED

53. There were no changes to the existing competition legislation. However, the Government reaffirmed its intention to introduce new legislation giving stronger powers to deal with cartels when the legislative timetable permitted.

Abuse of market powers

54. The Government published a consultative document on Abuse of Market Power in November 1992. The paper considered the case for changes to the part of United Kingdom competition law dealing with anti-competitive practices and monopolistic situations. The paper outlined various options, including the prohibition of conduct amounting to the abuse of market power. This option would parallel the proposals for a prohibition of anti-competitive agreements along the lines of Article 85 of the Treaty of Rome. The results of the consultation are awaited.

Competition and Service (Utilities) Act 1992

55. The main purpose of this Act is to bring the powers of all the regulators of privatized utilities up to the level of the strongest. The main substantive sections of the Act have now been phased in. The Act also provides the utility regulators with statutory powers to set and monitor standards for the utility companies and to resolve disputes between customers and the utilities.

56. The Act includes provisions to facilitate greater competition in gas supply and in the provision of water and sewerage services.

Guide to the Restrictive Trade Practices Act (RTPA)

57. A new booklet, Restrictive Agreements, was published in June 1992. This was designed to provide businesses of all kinds with a general guide to the law on restrictive trading agreements, explaining the impact it could have on

the conduct of their activities. The booklet complements the existing more detailed advisory booklet, Restrictive Trading Practices, aimed at professional advisers.

58. Under the 1986 OECD Council Recommendation on Cooperation on Restrictive Business Practices Affecting International Trade the OFT made six notifications to other countries' competition authorities of action taken by the United Kingdom under its RBP laws which might affect important interests of the other countries.

59. The OFT received 14 notifications under the same Recommendation from other countries' competition authorities of action taken by them under their RBP laws which might affect interests of the United Kingdom. The OFT also received two voluntary requests for information regarding investigations undertaken by other countries' competition authorities.

60. The OFT took part in a number of bilateral meetings with other competition authorities and interested parties from abroad. Visits to the United Kingdom were made by representatives of the competition authorities of Australia, Bulgaria, Canada, Cyprus, Czechoslovakia, Egypt, Finland, France, Germany, Ghana, Israel, Italy, Japan, Poland, the Slovak Republic, Sweden, the Ukraine and Venezuela. The OFT also received visits from representatives of universities and research institutes in Canada, France, Italy, Japan, Malaysia, Russia and Taiwan and from representatives of various government departments and other political organizations in Australia, Colombia, Russia, South Africa and also the OECD and UNCTAD.

61. In addition to these short visits, a number of longer secondments to the OFT were arranged. As part of the United Kingdom's ongoing policy of assistance to the former Soviet States an official from the Russian Anti-Monopoly Committee was seconded to the OFT for seven weeks. A Chinese student from the Centre for Modern Chinese Studies at Oxford University, and an official from the newly-established Jamaican Fair Trade Commission were also seconded to the OFT for one week each.

62. Representatives from the OFT visited Lithuania as part of an OECD mission to advise on the draft Lithuanian competition law, Austria in order to participate in an OECD seminar on cartels and market dominance, and also Czechoslovakia for a conference concerning Eastern European anti-trust laws. An official from the OFT participated in a Competition Workshop organized by UNCTAD in the People's Republic of China and discussed competition issues with government officials in Hong Kong. One official was seconded to the European Commission for one week and another was seconded to the Bundeskartellamt in Germany for two weeks.

UNITED STATES OF AMERICA

The Government of the United States submitted the following information:

63. During 1992 the United States federal antitrust authorities have frequently exchanged information with foreign RPB control authorities on law enforcement matters, frequently notified foreign competition authorities about action that the United States has taken in enforcing its antitrust laws that

may affect their interests, and frequently consulted with foreign competition authorities on matters of mutual interest. These exchanges of information, notifications, and consultations involved the authorities with which the United States has bilateral antitrust agreements (i.e., Australia, Canada, the Commission of the European Communities, and the Federal Republic of Germany), the competition agencies of other OECD countries, and many competition authorities of non-OECD countries in Africa, Central and Eastern Europe, Latin America and the Russian Federation.

64. With respect to technical assistance, in 1992 United States Government competition officials visited many developing countries and Central and Eastern European countries in order to respond to requests for technical assistance on competition issues; these countries included Bulgaria, the former Czechoslovakia, Estonia, Hungary, Indonesia, Latvia, Lithuania, Poland, Romania, the Russian Federation, and Venezuela, among others. Similarly, during 1992, Department of Justice and Federal Trade Commission officials met in Washington with competition officials from dozens of countries, and provided training courses in Washington to competition officials from several countries, including developing countries and Central and Eastern European countries.

Changes in Law or Policies

Changes in Antitrust Rules, Policies or Guidelines

65. On 2 April 1992, the Federal Trade Commission and the Department of Justice issued joint Horizontal Merger Guidelines (1992 Guidelines). The 1992 Guidelines update previous merger guidelines issued by the FTC and the Department, notably the Department's 1984 Merger Guidelines and the FTC'S 1982 Statement Concerning Horizontal Mergers. The 1992 Guidelines are the first to be issued jointly by the Department and the FTC, although both agencies have followed similar analytical principles for many years. The 1992 Guidelines improve upon previous analyses by articulating important advances in merger policy and theory. Most notably, they articulate more fully the ways in which a merger might have adverse competitive effects; expand on the treatment of entry, efficiencies and merger defences; and bring into merger analysis a number of non-structural factors that may affect competition.

66. On 3 April 1992, the Department of Justice announced that it will, in appropriate cases, take enforcement action against anticompetitive conduct occurring overseas that restrains United States exports. The policy supersedes a footnote in the Department's 1988 Antitrust Enforcement Guidelines for International Operations that had been interpreted as limiting challenges to foreign conduct to those with adverse competitive effects on United States consumers. This policy does not affect existing statutes or other law or established principles of personal jurisdiction.

67. In 1992 the Department and the FTC announced new procedures for coordination of the discovery phase of merger investigations with State antitrust enforcement agencies. The purpose of the new procedures is to reduce the number of duplicative or overlapping information requests that often result when a single merger is investigated by both federal and State antitrust authorities. The procedures require the voluntary consent of the

merging parties, who may waive the confidentiality requirements that normally preclude federal and State coordination. To implement the procedure, parties to a merger under investigation by the Department or the FTC and a State agency may waive confidentiality restrictions and agree to provide the State agency with a copy of its pre-merger filing. Thereafter the federal agency will provide the State agency with all information requests issued in its investigations and, to the extent practicable, cooperate with the State agency in analysing the merger.

68. The Department announced on 1 December 1992, that it had adopted a pilot programme to test a new expedited procedure for processing business review requests involving proposed joint ventures or information exchange programmes. Under the Department's business review procedure, persons concerned about the legality under the antitrust laws of proposed business conduct can request the Department to state its current enforcement intentions with respect to that conduct. The expedited procedure is designed to shorten the Division's response time, which is often prolonged by the need to obtain and examine additional information and documents relevant to the proposal under review. Under the expedited review procedure, parties may voluntarily submit certain information and documents contemporaneously with their initial review request. Where submissions provide an adequate basis for evaluation, the Department will make its best effort to respond within a 60- to 90-day period.

Official Proposals to Change Antitrust Laws, Related Legislation, or Policies

Department of Justice Comments on Proposed Legislation

69. On 30 April 1992, then AAG Rill appeared on behalf of the Department of Justice before the Senate Judiciary's Antitrust Subcommittee to discuss the Department's enforcement policy on export restraints. (A description of that policy appears at paragraph 5, Section I.A, above.) Mr. Rill also addressed international activities of the Antitrust Division, including the Department's support of bilateral antitrust cooperation, its involvement in the Structural Impediments Initiative between the United States and Japan, and its participation in the OECD's work toward increased cooperation and convergence in global antitrust enforcement.

70. The Department continued its support of legislative initiatives to extend the National Cooperative Research Act of 1984 ("NCRA") to joint production ventures, thereby removing legitimate ventures from the threat of per se antitrust liability and treble damages. The Department voiced opposition, however, to proposed provisions that would have limited the benefits of an expanded NCRA to ventures comprised of United States-owned firms or firms with production facilities in the United States. In 1992, in response to a threatened veto by the Bush Administration, the Senate passed a compromise whereby per se treatment and detrebling provisions would extend to all eligible joint production ventures that provided substantial benefits to the United States economy with principal production facilities in the United States or in a country that afforded United States firms "national treatment" under its antitrust laws applicable to joint production ventures. The legislation was not enacted during 1992, however.

71. In 1992 the Department considered the competitive impact of various legislative proposals for health-care reform. More than 100 such proposals were introduced in the 102nd Congress, some specifically proposing changes in the antitrust laws. One area of congressional concern was possible conflict between the goals of federal antitrust enforcement and the perceived need for greater consolidation in the health-care industry. In testimony presented by then Acting AAG James on 24 June 1992, the Department addressed the contention that federal antitrust enforcement may pose a barrier to efficiency-oriented structural reforms in the health-care industry. Mr. James said that federal merger and joint venture enforcement policies ensure that procompetitive and competitively neutral transactions are permitted to proceed, while prohibiting those that are anticompetitive. Instead of creating health-care exemptions or other restrictions on federal antitrust enforcement, the Department urged Congress to seek legislation that would clarify the application of existing antitrust law in private litigation.

72. The Department continued its opposition to proposed legislation on resale price maintenance that would effectively overrule the United States Supreme Court's decisions in Monsanto v. Spray-Rite, 465 U.S. 752 (1984) and Business Electronics Corp. v. Sharp Electronic Corp., 485 U.S. 717 (1988). Proposals under consideration in 1992 included: (1) mandating per se antitrust liability for an expanded range of resale agreements between manufacturers and distributors, and (2) permitting an inference of illegal agreement upon the introduction of certain unambiguous evidence. The Department opposed both proposals on the ground that, if enacted, the effect would be to deter procompetitive, efficient distribution arrangements. Although the House and the Senate each passed a bill, the proposed legislation was not enacted.

73. The Department opposed H.R. 5096, a bill that would have permitted the Bell Operating Companies (BOCs) to apply to the Attorney-General for permission to enter the lines of business that are or were forbidden to them under the Modified Final Judgement (the "MFJ", the 1982 consent decree settling the Government's antitrust case against AT & T). The MFJ currently prohibits the BOCs from providing inter-exchange telecommunication services or engaging in telecommunications manufacturing, and, until 1992, it prohibited the BOCs from providing information services. H.R. 5096 would have restored the full scope of the MFJ restrictions but allowed a BOC to petition the Department for permission to engage in restricted activity upon a showing that there was no "substantial possibility" that it or its affiliates could use monopoly power to impede competition in any relevant market. On 30 June 1992, then Attorney-General Barr wrote to the Chairman of the House Judiciary Committee stating the Department's opposition to H.R. 5096. Mr. Barr urged that the bill would not further the goal of competition, that it would bar potentially procompetitive entry by the BOCs into new lines of business, that it would establish unduly rigid and cumbersome procedural obstacles to such entry, and that it would place the Department in an inappropriate regulatory role.

74. The Department's position on codification of the MFJ restrictions was also stated in testimony by then AAG Rill on 18 March 1992, before the House Judiciary Subcommittee on Economic and Commercial law. Although no bill had had yet been introduced at the time of the hearing, the House requested the Department's views on codification of the MFJ restrictions and, more

specifically, on whether the MFJ line-of-business restrictions imposed on the BOCs should continue to apply indefinitely. Mr. Rill expressed the Department's concern that enacting the MFJ restrictions into statutory law could undesirably impede the competitive evolution of telecommunications markets. In addition, Mr. Rill noted the Department's support of legislation to remove manufacturing restrictions and the Department's opposition to legislation that would reimpose the restriction on information services that recently had been lifted by the courts. Previously, the Department had opposed local content and domestic manufacturing requirements in legislation to remove the manufacturing restriction.

75. The Department opposed several legislative proposals to add new private causes of action for unfair trade practices in international trade. S. 2352 would have created a new private cause of action under the Sherman Act, allowing actual damages, attorneys' fees and costs of suit to parties who could prove that benefits obtained from anticompetitive market protection abroad were employed to cause injury to the business or property of a person engaged in import or interstate commerce in the United States. S. 2508 would have amended the Clayton Act and the 1916 Unfair Competition Act by providing a new private cause of action for persons injured by dumped or subsidized imports, or by customs fraud. S. 2610 would have amended the 1916 Unfair Competition Act by deleting the predatory intent requirement and criminal liability. The Department expressed opposition to all three bills, stating that the proposals, if enacted, could chill legitimate price competition and cause friction with the United States' trading partners. In addition, the Department said that the administrative dumping and countervailing duty provisions in existing United States trade laws provide adequate remedies for dumped and subsidized imports, and that where pricing practices are actually predatory, the Sherman Act and the 1916 Unfair Practices Act condemn such practices and provide relief to injured parties.

FTC Comments on Proposed Legislation

76. The FTC submitted no written comments.

Enforcement of Antitrust Laws and Policies: Actions against Anticompetitive Practices

Department of Justice and FTC Statistics

Division staffing and enforcement statistics

77. With a staffing level of 581 full-time equivalent employees (including attorneys, economists, other professionals and clerical staff), the Department's Antitrust Division filed 69 antitrust cases during 1992 and opened 181 formal investigations. The Division participated in 20 United States antitrust cases on appeal before the United States Supreme Court or federal courts of appeals, and it appeared as amicus curiae in six federal appeals in private antitrust cases. The Division appeared in 48 regulatory agency proceedings by filing briefs and comments, participating in hearings, and presenting oral arguments.

78. The Division filed 78 criminal cases during 1992, and it obtained convictions or admissions of guilt from 39 individual and 51 corporate defendants. At the end of 1992 there were 151 antitrust grand jury investigations pending; and in 1992, 15 individual defendants were sentenced to 5,102 actual days of incarceration, and 2,489 days of other confinement, such as house-arrest, halfway-house detention or compulsory attendance at community correction or treatment centres. Fines and recoveries totalled more than $26.6 million. In addition, the Department recovered $27.5 million asset forfeiture, the largest civil penalty under Section 6 of the Sherman Act.

79. In conjunction with its civil enforcement programme, in 1992 the Antitrust Division reviewed 1,621 proposed merger transactions and investigated 88. The Division opened 156 civil investigations in 1992, both merger and non-merger, and issued 446 civil investigative demands, a form of compulsory process. During the year, the Division filed 11 civil complaints and 13 proposed consent decrees or final judgements in civil cases. Ten such decrees or judgements were entered by the courts. With respect specifically to merger enforcement, the Division publicly challenged eight merger transactions and filed suit to block three. Forty-seven requests for additional information were issued to parties to Hart-Scott-Rodino (HSR) Act pre-merger notification requirements.

FTC staffing and enforcement statistics

80. At the end of 1992, the FTC Bureau of Competition had 222 employees: 156 attorneys, 34 other professionals, and 32 clerical staff. The FTC also employs economists who participate in its antitrust enforcement activities.

81. During 1992, with respect to all matters affecting competition, including mergers, the Commission issued two opinions and two administrative complaints, gave final approval to 16 consent agreements, and at year end, had 4 outstanding consent agreements provisionally accepted in 1992, subject to public comment. The Commission initiated 83 initial phase and 42 full phase investigations. Additionally, there were 15 initial investigations converted to full phase. The Commission modified one final order. The Commission filed three civil penalty actions that resulted in the Commission obtaining two civil penalty judgements totalling $2,736,000; the third complaint was pending a final judgement at the end of the year. The Commission also obtained two civil penalty judgements, totalling $1,390,000, stemming from actions filed in 1991. Finally, the Commission authorized one preliminary injunction against a proposed merger.